

**FILED**

JUN 02 2015

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THOMAS EUGENE MOORE,

Plaintiff,

vs.

CALIFORNIA DEPARTMENT OF  
CORRECTIONS AND  
REHABILITATIONS DIRECTOR J.  
BEARD, et al.,

Defendants.

No. C 14-2566 LHK (PR)

ORDER OF SERVICE;  
DIRECTING DEFENDANTS TO  
FILE DISPOSITIVE MOTION OR  
NOTICE REGARDING SUCH  
MOTION

Plaintiff, a California state prisoner proceeding *pro se*, filed an amended civil rights complaint pursuant to 42 U.S.C. § 1983. For the reasons stated below, the court dismisses several defendants and orders service upon the remaining defendants.

**DISCUSSION**

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. *See id.* § 1915A(b)(1), (2). *Pro se* pleadings must, however, be liberally construed. *See Balistreri v. Pacifica Police*

1 *Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

2 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:  
 3 (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that  
 4 the alleged deprivation was committed by a person acting under the color of state law. *West v.*  
 5 *Atkins*, 487 U.S. 42, 48 (1988).

6 B. Plaintiff's Claims

7 In plaintiff's original complaint, he alleged that in July 2004, defendants<sup>1</sup> allowed  
 8 drinking water within Monterey County, Salinas, Soledad, and Salinas Valley State Prison  
 9 ("SVSP") to become contaminated, toxic, and undrinkable for human consumption. Between  
 10 July 2004 and August 2004, while plaintiff was confined at SVSP, plaintiff became ill.  
 11 Warnings were given about the contaminated water via flyers and posters, and plaintiff and other  
 12 inmates were instructed that they should not drink the water at SVSP facilities because the water  
 13 was unsafe. However, the warnings were given too late because plaintiff had already been  
 14 ingesting the contaminated water. Defendants CDCR Director J. Beard, Warden Lamarque,  
 15 Governor Brown Jr., and Doe #1 turned off the drinking water from plaintiff's cell, and plaintiff  
 16 was given bottled water by the cup. Eight years later, on November 8, 2012, plaintiff was  
 17 diagnosed with prostate cancer, and on October 23, 2013, plaintiff discovered that the nitrate and  
 18 other hazardous materials that were present in the water in 2004 are some of the chemicals  
 19 known to cause cancer. Plaintiff claims that defendants exposed plaintiff to these chemicals,  
 20 which caused plaintiff's cancer.

21 The court dismissed the complaint with leave to amend. In plaintiff's amended  
 22 complaint, he names as defendants: CDCR Director J. Beard; SVSP Warden Lamarque; the  
 23 County of Monterey; the City of Soledad; MCWRA; MPWMD; and Does. Plaintiff pleads the  
 24

---

25 <sup>1</sup> Plaintiff names as defendants the California Department of Corrections and  
 26 Rehabilitation ("CDCR") Director J. Beard; Salinas Valley State Prison Warden Lamarque;  
 27 Governor J. Brown; the County of Monterey; the City of Soledad; the Monterey County Water  
 28 Resources Agency ("MCWRA"); the Monterey Peninsula Water Management District  
 ("MPWMD"); and Doe defendants.

1 same general facts regarding what defendants did and did not do, and adds that defendants Beard  
2 and Lamarque knew that the water was unsafe for drinking in 1999 but failed to take any  
3 reasonable measures to address it.

4       Liberally construed, plaintiff has stated a cognizable claim for relief against defendants  
5 Beard and Lamarque.

6       Plaintiff's allegations against "Doe" defendants are DISMISSED without prejudice.  
7 Although the use of "John Doe" to identify a defendant is not favored in the Ninth Circuit, *see*  
8 *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980), situations may arise where the identity  
9 of alleged defendants cannot be known prior to the filing of a complaint. In such circumstances,  
10 the plaintiff should be given an opportunity through discovery to identify the unknown  
11 defendants, unless it is clear that discovery would not uncover their identities or that the  
12 complaint should be dismissed on other grounds. *See id.* Should plaintiff discover the identities  
13 of the Doe defendants, he may move to amend his complaint to include them in this action at a  
14 later date.

15       Finally, plaintiff's claim against municipal defendants Monterey County, the City of  
16 Soledad, MCWRA, and MPWMD are DISMISSED for failure to state a claim. Plaintiff was  
17 already warned that to raise a claim of municipal liability, a plaintiff must show: (1) that the  
18 plaintiff possessed a constitutional right of which he or she was deprived; (2) that the  
19 municipality had a policy; (3) that this policy amounted to deliberate indifference to the  
20 plaintiff's constitutional rights; and (4) that the policy was the moving force behind the  
21 constitutional violation. *See Plumeau v. School Dist. #40 County of Yamhill*, 130 F.3d 432, 438  
22 (9th Cir. 1997). However, a municipality does not cause the alleged violation, and therefore is  
23 not liable under Section 1983, if it does not have the power to remedy the alleged violation. *See*  
24 *Estate of Brooks v. United States*, 197 F.3d 1245, 1248-49 (9th Cir. 1999).

25       In the amended complaint, plaintiff alleges that the municipal defendants are responsible  
26 for providing safe, clean drinking water, and that they did not have a policy providing for  
27 medical treatment or medical information to prevent cancer from ingesting unsafe water. The  
28 claim against municipal defendants must be dismissed for the following reasons. First, plaintiff



1 states that the municipal defendants are responsible for providing safe and clean drinking water.  
 2 However, there is no indication that municipal defendants are also responsible for an SVSP  
 3 inmate's medical needs or treatment, or that municipal defendants had the power to remedy a  
 4 violation of a deliberate indifference to an SVSP inmate's health or safety. Second, in order to  
 5 allege municipal liability under a theory that the municipality had a policy of inaction, a plaintiff  
 6 must show that, through its omissions, a municipality is "responsible for a constitutional  
 7 violation committed by one of its employees." *Gibson v. County of Washoe*, 290 F.3d 1175,  
 8 1186 (9th Cir. 2002). A plaintiff must also show that the municipality's deliberate indifference  
 9 led to the omission and the omission caused the employee to commit the constitutional violation.  
 10 *Id.* Here, plaintiff does not allege that any municipal employee was responsible for violating  
 11 plaintiff's constitutional rights. Finally, plaintiff has not plausibly suggested that he would have  
 12 avoided contracting prostate cancer had defendants implemented proper policies. *See Long v.*  
 13 *County of Los Angeles*, 442 F.3d 1178, 1190 (9th Cir. 2006) (stating that "[f]or a policy to be the  
 14 moving force behind the deprivation of a constitutional right, . . . [t]he plaintiff's burden is to  
 15 establish that the injury would have been avoided had proper policies been implemented.").

16 Accordingly, defendants Monterey County, the City of Soledad, MCWRA, and MPWMD  
 17 are DISMISSED with prejudice for failure to state a claim. Plaintiff cannot sustain a claim  
 18 against Monterey County, the City of Soledad, MCWRA, and MPWMD for failing to have a  
 19 policy providing for medical treatment or medical information to SVSP inmates after ingesting  
 20 unsafe water because municipal entities do not operate state prisons. Thus, the municipal  
 21 defendants did not have the authority to alter any medical policy or treatment affecting inmates  
 22 at SVSP. *See Estate of Brooks*, 197 F.3d at 1248 (affirming dismissal of *Monell* claim against  
 23 the county because the county's omission in policy was not the legal cause of plaintiff's injury  
 24 and had no authority to remedy the alleged violation). Amendment would be futile because "it  
 25 appears beyond doubt that the plaintiff can prove no set of facts in support of" his claim against  
 26 Monterey County, the City of Soledad, MCWRA, and MPWMD which would entitle him to  
 27 relief. *See Weilburg v. Shapiro*, 488 F.3d 1202, 1205 (9th Cir. 2007) ("Dismissal of a *pro se*  
 28 complaint without leave to amend is proper only if it is absolutely clear that the deficiencies of

1 the complaint could not be cured by amendment.”).

## 2 CONCLUSION

3 For the foregoing reasons, the court hereby orders as follows:

4 1. Defendants Does are DISMISSED without prejudice. Defendants Monterey  
5 County, the City of Soledad, MCWRA, and MPWMD are DISMISSED with prejudice for  
6 failure to state a claim.

7 2. The clerk of the court shall mail a Notice of Lawsuit and Request for Waiver of  
8 Service of Summons, two copies of the Waiver of Service of Summons, a copy of the amended  
9 complaint and all attachments thereto (docket no. 11), and a copy of this order to **CDCR J.**  
10 **Beard and Warden Lamarque at Salinas Valley State Prison.** The clerk of the court shall  
11 also mail a courtesy copy of the amended complaint and a copy of this order to the California  
12 Attorney General’s Office. Additionally, the clerk shall mail a copy of this order to plaintiff.

13 3. Defendants are cautioned that Rule 4 of the Federal Rules of Civil Procedure  
14 requires them to cooperate in saving unnecessary costs of service of the summons and complaint.  
15 Pursuant to Rule 4, if defendants, after being notified of this action and asked by the court, on  
16 behalf of plaintiff, to waive service of the summons, fail to do so, they will be required to bear  
17 the cost of such service unless good cause be shown for their failure to sign and return the waiver  
18 form. If service is waived, this action will proceed as if defendants had been served on the date  
19 that the waiver is filed, and defendants will not be required to serve and file an answer before  
20 sixty (60) days from the date on which the request for waiver was sent. Defendants are asked to  
21 read the statement set forth at the bottom of the waiver form that more completely describes the  
22 duties of the parties with regard to waiver of service of the summons. If service is waived after  
23 the date provided in the Notice but before defendants have been personally served, the Answer  
24 shall be due sixty (60) days from the date on which the request for waiver was sent or twenty  
25 (20) days from the date the waiver form is filed, whichever is later.

26 4. No later than **sixty (60) days** from the date the waivers are sent, defendants shall  
27 file a motion for summary judgment or other dispositive motion with respect to the cognizable  
28 claims in the complaint.

Any motion for summary judgment shall be supported by adequate factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil Procedure. **Defendants are advised that summary judgment cannot be granted, nor qualified immunity found, if material facts are in dispute. If defendants are of the opinion that this case cannot be resolved by summary judgment, they shall so inform the court prior to the date the summary judgment motion is due.**

5. Plaintiff's opposition to the dispositive motion shall be filed with the court and served on defendants no later than **twenty-eight (28) days** from the date defendants' motion is filed. Plaintiff is advised to read Rule 56 of the Federal Rules of Civil Procedure and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (holding party opposing summary judgment must come forward with evidence showing triable issues of material fact on every essential element of his claim).

6. Defendants shall file a reply brief no later than **fourteen (14) days** after plaintiff's opposition is filed.

7. The motion shall be deemed submitted as of the date the reply brief is due. No hearing will be held on the motion unless the court so orders at a later date.

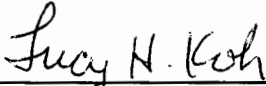
8. All communications by the plaintiff with the court must be served on defendants or defendants' counsel, by mailing a true copy of the document to defendants or defendants' counsel.

9. Discovery may be taken in accordance with the Federal Rules of Civil Procedure. No further court order is required before the parties may conduct discovery.

10. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the court and all parties informed of any change of address and must comply with the court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

IT IS SO ORDERED.

DATED: 6/1/2015

  
 LUCY H. KOH  
 United States District Judge